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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. 81-2182

DEAN GANA, PETITIONER

v.

STATE OF HAWAII

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Defendant-Appellee ("Petitioner") DEAN GANA submitted to this Court a petition for a writ of certiorari from the adverse decision in the case of State of Hawaii, Plaintiffi-Appellant v. Stephen G. McCully[1] and

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[1] Stephen G. McCully was a co-defendant and co-appellant, but is not petitioning for a writ of certiorari.

Dean Gana, Defendants-Appellees of the Hawaii Supreme Court, 642 P.2d 933, ____ Haw. ____ (No. 7759, March 24, 1982) (Petitioner's Appendix A)

In prosecution for drug offenses, Third Circuit Court Judge Shunichi Kimura, prior to trial, granted Defendant's motion for suppression of the evidence obtained by the Police Department of the County of Hawaii upon search of first class United States mail parcel. The search was made pursuant to search warrant issued by Mark Norman Olds, District Judge of the Third Circuit of the State of Hawaii, and served on Arthur Aiwohi, postmaster of Hilo Airport Post Office.

Judge Kimura granted the motion for suppression concluding that the State search warrant issued for the search and seizure of a package located in the custody of the United States Postal Service at the Hilo Airport Post Office was invalid as a federal search warrant was required. (Petitioner's Appendix D at p. 33a.)

The Hawaii Supreme Court's opinion states the pertinent facts for considering this petition. State v. McCully, 642 P.2d 933, 936-38 (1982). (Petitioner's Appendix A, pp. 9a - 19a). The facts that are referred to in the opinion were in the record on appeal.

The facts indicate the police cooperated with the postal authorities. The Honolulu postal inspector in advising police on proper procedures did not state that a federal warrant was required. In fact, the State search warrant was accepted by the Hilo Postmaster. Furthermore, Steve Ovelgonne, a postal inspector in Honolulu, testified that on February 2, 1978, and prior thereto, post offices in California honored State search warrants. In addition, Ovelgonne testified that the police were not required to secure a federal search warrant because, at that time, the law department of Postal Service had stated that new instructions were forthcoming, but they were not

issued until after February 2, 1978.

II. QUESTION PRESENTED

Whether a state search warrant, issued for the investigation of a state criminal offense, is valid, when served on a postal official at a United States Post Office for the search and seizure of a mail parcel.

III. REASONS FOR DISALLOWANCE OF THE WRIT.

A. This court lacks jurisdiction.

B. The allegedly "conflicting" decision relied upon by petitioner is distinguishable on its facts and on the law.

C. A review by this court would involve a review of complex set of facts and for various reasons this case is not likely to recur.

IV. ARGUMENT

A. This court lacks jurisdiction.

The petitioner claims jurisdiction pursuant to United States Code Title 28, §1257(3), which states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute

> of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In Bateman v. Arizona, 429 U.S. 1306, 97 S.Ct. 1, 50 L.Ed.2d (1976) (Rehnquist, J., in chambers). Mr. Justice Rehnquist held that this "Court is precluded from taking cases unless the petition is from a 'final judgment' within the meaning of 28 U.S.C. §1257. In a criminal case, the 'final judgment' is, of course, the imposition of a sentence. Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 165. 82 L.Ed. 204 (1937)."

This court lacks jurisdiction since the case has not gone to trial. The judgment of the Hawaii Supreme Court does not terminate

the litigation between the parties but in fact allows the State to proceed with the prosecution of defendants who are charged with wholly state offenses. There is clearly no final judgment from which this court may review.

Furthermore, it has been held that generally, the state can exercise jurisdiction over acts committed within its physical boundaries. However, it is also established that certain exceptions to this rule exists. In short, the federal government can exercise exclusive jurisdiction within a state by the "pre-emption of the State's power by either constitutional provision or by clear and unambiguous federal legislation, reserving that subject area or land area to federal control exclusively," People v. Mitchell, 90 Misc. 2d 463, 395 N.Y.S.2d 340 at 341 (1977), or by the cession of land and jurisdiction exclusively to the federal government. See, Art. I § 8 cl. 17, Constitution of the United States of America.

It is clear that the State of Hawaii is a sovereign entity which has retained its police power notwithstanding its admission into the United States of America. See §§ 1, 12, 15, and 16 of the Admissions Act (Pub. L. 86-3, 73 Stat. 4, March 18, 1959). See also Article I of the Constitution of the State of Hawaii.

It is equally clear that pursuant to this retained police power, the State may regulate the use of controlled substances within its borders. State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975), and State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972).

Here, Defendants are charged with state offenses. Defendant Gana is charged with Attempted Promoting of a Dangerous Drug, and Defendant McCully with Attempted Promoting, and Promoting of a Dangerous Drug and Promoting a Detrimental Drug. These offenses constitute acts that the state legislature has deemed punishable by law.

Beyond this naked constitutional question, it is evident that based on a consideration of the Hawaii Constitution, Hawaii Statutes, and court rules governing search warrants, that Judge Olds acted within his authority to issue a valid warrant. See Article I, §§ 5-6 of the Constitution of the State of Hawaii; Chapter 803, H.R.S.; Sections 705-500, 712-1241, and 712-1242, H.R.S.; Chapter 604, H.R.S., and Rule 41 of the Hawaii Rules of Penal Procedure.

The applicable statutory and rule sections on February 2, 1978, did not prevent the service of a state warrant.

State submits that the State of Hawaii has jurisdiction to regulate the possession, sale, or use of controlled substances within the state. That even in light of the postal clause, Article I, Section 8, of the Constitution of the United States and Title 39, the State of Hawaii was not pre-empted from the search for and seizure of illicit drugs pursuant to its police powers.

The State submits that due respect for the principles of comity necessitates a denial of certiorari in order to allow the State to proceed with the timely prosecution of defendants for the state drug offenses. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

B. The allegedly "conflicting" decision relied upon by petitioner is distinguishable on its facts and on the law.

The petitioner only found one example of a conflict with the decision of the Hawaii Supreme Court. the petitioner relies on Ex Parte Phoedivius, 177 C.238, 170 P.412 (1918), where it was held that a California statute prohibiting the shipping by parcel post of wild game did not unlawfully interfere with interstate commerce, even though game could be lawfully shipped out of the state if other means of transportation were used. However, the court never held that a state court does not have authority to issue

a state search warrant for the search and seizure of the United States mail. The court did note that:

> When game is deposited in the parcel post it is at once subject to the exclusive control of the postal authorities under the statutes of the United States and regulations of the Post Office Department, and absolutely free from state inspection and control.

The case does not address itself to the issue of whether a state search warrant is invalid within the meaning of 39 U.S.C. 3623(d). Furthermore, the facts in the present case indicate that the postal authorities directed the police officers to secure a warrant which the officers presented to the authorities prior to the search and seizure of the evidence.

The State submits that the case cited by petitioner is consistent with the position of the Hawaii Supreme Court because on February 2, 1978, the date the warrant was issued by the State (Judge Olds), first class mail was free from State inspection and

control except under authority of search warrant authorized by law pursuant to United States Code, Title 39, §3623(d). It must be emphasized that there were no federal cases, statute, or regulations on February 2, 1978, that prohibited the use of the state search warrant.

The Hawaii Supreme Court reasoned that the "validity of a search warrant is determined as of the date it is issued and executed, United States v. Doe, 19 F.R.D. 1 (D.C.E.D. Tenn. 1956)." State v. McCully, 642 P.2d 933, 937 (1982).

Therefore, the court rejected the postal regulations cited by petitioner that were not in existence when the police obtained the search warrant pursuant to the instructions of the local postal authorities.

The State submits that a review of the allegedly "conflicting" decision reveals that the cases are distinguishable on the facts and on the law.

C. A review by this Court would involve a review of complex set of facts and for various reasons this case is not likely to recur.

The Hawaii Supreme Court opinion is accurate and correct. The court reviewed the entire record and took note of the totality of circumstances regarding the conduct of the police and postal authorities.

The carefully reasoned, unanimous opinion of the court recognized that there existed no statute or regulation that prohibited the issuance of the warrant on February 2, 1978.

However, in holding that the state search warrant was valid for search and seizure of the first class mail, the court did recognize that postal regulations effective on May 5, 1978, directed federal postal authorities to honor only federal warrants.

In light of this, it is unlikely that postal authorities will recognize state

warrants. In any event, there can be no standing to raise the issue of alleged violations of the Postal Regulations as a basis of suppressing a validly issued search warrant. Warren v. United States, 183 Fed. 718 (8th Cir. 1910).

In addition, it must be stressed that in the present case, the police sought the advice of the postal authorities on the proper search warrant procedures. There was no willful attempt on the part of the government agents to circumvent or disregard the law. Indeed, the law at the time only required that no first-class mail of domestic origin be opened except under authority of search warrant authorized by law.

Considering the conduct of the police officers and postal authorities, the applicable law on the date the search warrant was issued, and the postal regulation subsequently adopted, it is obvious that the issue in the present case is unlikely to

recur and is too narrow to warrant review by this court on certiorari.

V. CONCLUSION

In the realm of factual review and analysis, the rulings of the highest courts of the states are treated with and entitled to great weight. The present case, Petitioner raises questions turning entirely on the facts of this case, already resolved in favor of respondent, and without any impact outside the limits of this case.

Finally, this court lacks jurisdiction because of the lack of finality, therefore, certiorari should be denied.

DATED: AUG 30 1982

Respectfully submitted,

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Prosecuting Attorney

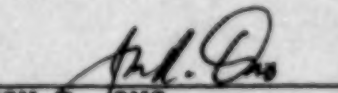
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CERTIFICATE OF SERVICE

I, Jon R. Ono, hereby certify that on this 30th day of August, 1982, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, airmail postage prepaid, to the following counsel:

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